

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 527 OF 2018

ROSE ANYANGO MARIENGACLAIMANT

VERSUS

EURO WATER SERVICES LIMITEDRESPONDENT

RULING

The applicant herein contracted the respondent to drill a bore hole at her premises known as LR No. Tasia – 11 -97-0962/532 located in Tasia Estate Nairobi. It was her case that the respondent failed to carry out its mandate under the agreement and a dispute therefore was declared. An arbitrator was appointed by the Law Society of Kenya in the name of Ms. Njeri Onyango, Advocate. Arbitration proceedings were conducted and by a letter dated 5th April, 2018 the Arbitrator notified the parties that the award was ready.

The final award was delivered on 18th September, 2018 except the assessment of costs. By a Chamber Summons dated 16th and filed on 22nd October, 2018 the applicant sought orders that the Arbitral award dated 18th September, 2018 be recognized, adopted, and enforced as a decree of the court and the matter be referred to the Deputy Registrar for assessment and taxation of costs of the arbitral proceedings. The reasons for seeking the said orders have been set out on the face of the application; most importantly that the statutory period of three months has lapsed and the respondent has not taken any steps with a view to challenging the arbitral award.

The application is opposed and there are grounds of opposition lodged by the advocates for the respondent stating that, the application is premature and intended to steal a march against the respondent who had three months to file an application to set aside the arbitral award as set out under Section 35 of the Arbitration Act. Further, the respondent has filed an application to set aside the said arbitral award delivered on 18th September, 2018.

From the record, it is true that there is an application lodged by the respondent as applicant, to set aside the said arbitral award. Both parties have filed submissions to the applicant's application and cited some authorities which I have noted. The applicant's application is brought under Section 36 of the Arbitration Act Cap 39 Laws of Kenya Rules 4 (1), (2), (3),(5), (6),and (9) of the Arbitration Rules.

Having considered the issues raised in the respective affidavits and the authorities cited, I believe the only issue is whether or not the three months had expired before the lodging of the application by the applicant to adopt and enforce the arbitral award. Several authorities cited point to the fact that, time of delivery and receipt of the arbitral award is equivalent to the date of the Notice by the arbitrator the parties – see **Kenyatta International Convention Centre (KICC) vs Green Star systems Limited (2018) e KLR.**

The application before me is not an appeal. This is not the forum therefore to interfere with the arbitration award as I would placing myself in a position of the Court of Appeal see **Mahican Investments Limited and 3 Others vs. Giovanni Gaida & Others (2005) e KLR.**

The arbitrator wrote to the parties on 5th April, 2018 informing them that the award was ready for delivery upon payment of outstanding fees. When time is computed from the date of that letter to the date this application was filed, a period of three months had elapsed.

The application to adopt the award came before the respondent's application to set aside the said award. I have no reason to address the respondent's application, because, I am persuaded the applicant's application is properly before the court upon which a ruling has to be rendered. In any case, Section 35 of the Arbitration Act bars any challenge after three months from the date of delivery of the award. Having accepted the applicant's contention that time started to run from the date the notice was given to the parties by the arbitrator that the award was ready, then the respondent cannot challenge that award in view of the Section 35 aforesaid – See **Ann Mumbi Hinga vs. Victoria Njoki Gathara**

I observe that the submissions by the respondent relating to the applicant's application are tilted towards an appeal or put another way, the merits of the arbitral award. That is not the function of the court required to adopt the said award. As has been stated in the case of Kenyatta Convection Centre, the arbitrator is the master of the facts and it is not open to this court to question the award at this stage. I accept, uphold and allow the applicant's application as presented and grant the orders as prayed with costs.

Dated, signed and delivered at Nairobi this 15th Day of March, 2019.

A. MBOGHOLI MSAGHA

JUDGE